No. 02-49

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JONATHAN LEWIN,

Petitioner,

v.

WILLIAM J. COOKE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pro Se Petitioner

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ADDITIONAL PROVISIONS INVOLVED

For brevity, pertinent parts of the following provisions are set forth in the Reply Appendix: the *Ex Post Facto* Clauses of the United States Constitution in Article I: Section 9, Clause 3, and Section 10, Clause 1; Fed. R. App. P. 4(a)(4)(A); and Fed. R. Civ. P. 59(e).

REPLY ON REASONS FOR GRANTING THE WRIT

I. When an appellant asserts that the circuit court's unpublished opinion in his case disobeys this Court's controlling precedent there is a due process right to publication.

The Respondents ["Defendants"] concede by lack of opposition central points of the Petition.

Regarding the question of whether the defense of qualified immunity may be first raised on appeal by a circuit court without notice to the plaintiff, the Defendants do not dispute that the Fourth Circuit disobeyed this Court's holding clearly set forth by *Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980).

In *Gomez*, this Court held that the burden of pleading qualified immunity rests with a defendant; the burden of anticipating that defense is *not* imposed on a plaintiff. [Petition ("Pet.") at 22-23]. Not imposing that burden on a plaintiff means that a court should not raise that defense on a defendant's behalf. The burden of pleading the defense rests with a defendant, and a defense which defendants do not plead – as they did not plead it in this case – is never to be invoked by an appellate court as a ground for sanctioning the plaintiff.

The Defendants offer no counter argument. Their only recourse is rhetorical. They would characterize the Fourth Circuit's disobedience to this Court's holding as "garden variety" disobedience. [Opposition Brief ("Op.") at 8].

Disobedience is all the more disturbing in this case because of the procedural history. The Fourth Circuit's *per curiam* panel drafted the first of its two unpublished

opinions on January 7, 2002. Petitioner put the panel on notice of the conflict with this Court's controlling precedent when he filed his first Petition for Rehearing on January 22, 2002 [Pet. at 135a, 147a-48a] and again on February 12, 2002, when he filed his first Motion for Publication [Pet. at 163a, 167a]. See also the second Petition for Rehearing, filed March 22, 2002 [Pet. at 186a, 203a-04a], and the second Motion for Publication, filed April 5, 2002 [Pet. at 208a, 224a].

The Fourth Circuit responded to the first Petition for Rehearing and the first Motion for Publication by issuing a revised unpublished opinion on March 8, 2002. But even after the panel had been put on notice of its conflict with this Court's holding on qualified immunity, the panel preserved that conflict. The March 8 opinion still proposed that qualified immunity – invoked for the first time in this case by the panel itself – should be a ground for sanctioning the Petitioner.

After the Fourth Circuit had been put on notice, and yet the Fourth Circuit persisted in changing the law, the change could no longer be deemed accidental. It appeared that a *per curiam* panel of a circuit court was denying the supremacy of this Court to establish the law of the land. *Cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he interpretation of the Fourteen Amendment enunciated by this Court . . . is the supreme law of the land . . . No . . . judicial officer can war against the Constitution without violating his undertaking to support it.")

After the Fourth Circuit had been put on notice, it could not have remained unaware that it was changing the law. If the change had been made in good faith, then the Fourth Circuit would have had nothing to hide, and the change to the doctrine of qualified immunity would certainly have been important enough to be published in accord with the Fourth Circuit's Local Rule 36b (i) & (ii) which provides for publication of a decision that "modifies . . . a rule of law" or which "involves a legal issue of continuing public interest" [Pet. at 165a]. Indeed, the Petitioner's first Motion for Publication invoked that local rule

as a ground for publication before invoking due process as the alternate ground [Pet. at 165a, 167a].

If the change to the doctrine of qualified immunity had been made in good faith, then the local rule would have been applied in good faith. It appears, however, that the change, though not an accident, was not intended for scrutiny by the public and the Bar. The local rule allowing for publication of changes to a rule of law was dependent upon the discretion of the circuit court which, by denying the first and second Motions for Publication [Pet. at 46a-48a], showed its preference that the change should not be scrutinized.

It is illicit for judges of an inferior federal court to disobey the controlling precedents of this Court. Disobedient judges may be understandably reluctant to advertise their own transgression. A published transgression would have precedential value, at least within the same circuit. Some litigants would cite it, seeking to benefit from it. Others would strongly object that the change in the law, contrary to a controlling precedent of the Supreme Court, must be illegitimate. Sooner or later the change would have to be reversed by the circuit, or it would come to the attention of this Court, and be corrected here. But an illicit change that is not published, and which therefore is not binding within its own circuit, might be "swept under the rug."

A local rule is plainly not a sufficient safeguard where disobedience is at issue. It is not enough to say that because judges of inferior courts *should not* be disobedient, therefore disobedience is inconceivable. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). It should never appear that a change to the law that has been challenged as illicit is being deliberately concealed from scrutiny by an inferior court. " '[F]astidious regard for the honor of the administration of justice requires the Court to make certain *that the doing of justice*

be made so manifest that only irrational or perverse claims of its disregard can be asserted.'" *Mesarosh v. United States*, 351 U.S. 1, 14 (1956) (citation omitted, emphasis added.)

The Defendants claim that there could not be a due process right to the publication of an unpublished opinion because – in their analysis – the due process right in question could not be classified as either "substantive" or "procedural." But of course, in the circumstances of this case, the due process right to publication can be classified as either, or both.

The Defendants argue that substantive due process applies to protect persons who would otherwise be deprived of property in an arbitrary manner by the power of government. [Op. at 2]. And indeed, due process "has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (original emphasis). And indeed, the taking of property by judicial order is at issue here. The Defendants conveniently forget that this case is about monetary penalties: a Rule 11 sanction of $5,000.00, and a Rule 54 penalty of $38,482.73. The right to publication asserted in this case is based on a decision by a circuit court to deprive Petitioner of his property, and it would be odd for a circuit court decision to be regarded as anything but deliberate.

The deliberate nature of the Fourth Circuit's decision is reinforced in this case, significantly so, by the two Petitions for Rehearing and the two Motions for Publication, each putting the Fourth Circuit on notice of its conflict with this Court's controlling precedent. The Fourth Circuit refused to correct the conflict, and likewise refused to publish its opinion: choices which can hardly appear to be anything but deliberate.

Disobedience to the controlling precedent of this Court is not legitimate, by definition. A deprivation of property predicated on such disobedience would be still more arbitrary and oppressive if that disobedience could also be concealed – and insulated from scrutiny and from

correction – through a circuit court's refusal to publish. This Court recognizes:

> the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta . . . was "'intended to secure the individual from the arbitrary exercise of the powers of government,'" . . . ("The touchstone of due process is protection of the individual against arbitrary action of government . . . ") [and, with specific reference to the Due Process Clause of the Fifth Amendment, due process] serves to prevent governmental power from being "used for purposes of oppression."

Id. (citations omitted).

The right to publication is also supported by procedural due process. In *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-32 (1994), this Court held that the removal of a deeply-rooted judicial procedure, without proper justification or adequate replacement, violates a litigant's procedural due process rights. In *Honda*, the procedure was judicial review of punitive damages awarded by a jury. A long tradition of that review was found in the common law.

But how much more compelling must be the Constitutional tradition that inferior federal courts conform their decisions to obey the precedential holdings of this Court. The obedience of inferior courts to this Court is a deeply-rooted judicial procedure of paramount importance to prevent anarchy in the federal system. Removal of that time-honored procedure must therefore violate procedural due process for everyone who depends on it.

This Court, rebuking the Fourth Circuit for disobedience in *Hutto v. Davis*, 454 U.S. 370, 375 (1982) admonished: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts. . . . "

Once a litigant objects that a lower federal court is using its choice not to publish to enable that court to violate due process, then, to safeguard the appearance of

justice, nonpublication must yield to a procedural due process right.

In matters of due process, appearances count. [Pet. at 13, 16-17].

As in *Honda*, when procedural due process might otherwise be compromised, this Court preserves due process by requiring a procedural safeguard. "[I]t is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

This Court has observed that there are shared concerns between the *Ex Post Facto* Clauses of the Constitution and the Due Process Clause. Comparing each kind of protection, this Court has said: "The Due Process Clause also protects the interests in fair notice and repose . . . " *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Litigants routinely rely upon the authority of this Court's controlling precedents. It would seem to be a matter of fundamental justice that settled expectations based on this Court's holdings should not be easily disrupted, without warning and in secret, by lower federal courts.

This Court has identified different varieties of *Ex Post Facto* violations, but the varieties all have in common that "the governments refuses, after the fact, to play by its own rules . . . " *Carmel v. Texas*, 529 U.S. 513, 533 (2000).

"[L]itigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991). Judges of lower federal courts no longer play by their own rules when their published decisions obey Supreme Court precedent, but their unpublished decisions do not. Refusal by government officials to play by their own rules opens the door to "retribution against unpopular groups or individuals" *Landgraf*, 511 U.S. at 266. During this time of the "crisis of volume" [Pet. at 6 & n.1] academic commentators and the popular media raise a hue and cry about nonpublication. [Pet. at 7-10 & n.6-7, n.11; 17 & n.19; 172a-79a & n.6-7, n.9, n.11; 213a]. It appears that – sometimes, at

least – nonpublication enables violations of due process. *Id.*

The Defendants try with rhetorical scorn to diminish the significance of the questions in the Petition. They claim that these questions are not sufficiently "compelling." In contrast to their claim, the legislative branch of the federal government is already taking an interest in the potential for abuse in unpublished opinions. This has been the topic of a recent oversight hearing held by the House of Representatives' Subcommittee on the Courts, the Internet, and Intellectual Property on June 27, 2002.

Among the criteria for granting a Petition for Writ of Certiorari are that "a . . . United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Regarding qualified immunity, the Defendants do not deny that such a conflict is manifest here.

II. A decision disposing of the merits of a case is "final" for the purpose of Fed. R. Civ. P. 54(d)(2)(B), and subject to that Rule's 14-day timeliness requirement.

The Defendants draw no support from the one authority they cite regarding the 14-day timeliness requirement for a Rule 54 motion seeking attorney fees.

They cite *Weyant v. Okst*, 198 F.3d 311 (2nd Cir. 1999). *Weyant* deliberates as to when the 14-day timeliness requirement begins to run. *Weyant* concludes that the 14 days begin when a judgment has finality. *Weyant,* 198 F.3d at 315, plainly states:

> A judgment's finality is restored upon the resolution of the last of any post-judgment motions that operated to suspend finality.

To determine what kind of post-judgment motions operate to suspend finality, *Weyant* looks to Fed. R. App. P. 4(a)(4)(A) which provides a list of post-judgment motions.

From that list, *Weyant* gives, as an example, a timely motion for alteration or amendment of the judgment under Fed. R. Civ. P. 59(e).

Weyant concludes "that a Rule 54(d)(2)(B) motion is timely if filed no later than 14 days after the resolution of such a [timely] Rule . . . 59 motion." 198 F.3d at 315.

None of this helps the Defendants. In this case, no post-judgment motion operated to suspend the finality of the Judgment that was entered on May 1, 2000. The Defendants belatedly sought fees for work done toward that May 1 Judgment. Because that Judgment's finality was never disturbed, any Rule 54 motion for attorney fees for work attributable to the May 1 Judgment was required to be filed within 14 days after the May 1 Judgment. The timeliness requirement of Rule 54(d)(2)(B) is strict.[1]

Following the May 1 Judgment, on May 30, 2000, Petitioner filed a Notice of Appeal to the Fourth Circuit.

In her June 27, 2000 opinion, Judge Smith of the district court acknowledged that: "plaintiff's notice of appeal divests this court of jurisdiction with regard to all aspects of the case properly involved in the appeal" (citing *Fobian v. Storage Technology Corp.*, 164 F.3d 887, 888 (4th Cir. 1999) [Pet. at 77a].

Also on May 30, 2000, Petitioner filed a motion for reconsideration. As a Rule 60(b) motion filed more than 10 days after the May 1 Judgment, the May 30 motion did not disturb the finality of the May 1 Judgment. Fed. R. App. P. 4(a)(4)(A)(vi).[2]

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[1] *Logue v. Dore*, 103 F.3d 1040, 1047 (1st Cir. 1997); *United Industries, Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 766 (5th Cir. 1996); *Allen v. Murph*, 194 F.3d 722, 724 (6th Cir. 1999); *Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645, 649 (11th Cir. 1990); *Sol Salins Inc. v. W.M. Ercanbrack Co., Inc.*, 155 F.R.D. 4, 5 (D.D.C. 1994).

[2] *See Fobian*, 164 F.3d at 891. After the filing of a Notice of Appeal, jurisdiction was before the Fourth Circuit, and the district court retained only enough jurisdiction to be able to *deny* a Rule 60 motion. The district court could not *grant* a Rule 60 motion unless the Fourth

(Continued on following page)

The Fourth Circuit considered the issue of Rule 54(d)(2)(B) timeliness in another case, and ruled in a manner unfavorable to the Defendants. The Fourth Circuit held that if a party is victorious in a sequence of judgments entered at different times, then that party must seek fees for the work pertaining to each judgment no later than 14 days after each one. *Barghout v. Bureau of Kosher Meat and Food Control*, 1988 U.S. App. LEXIS 7829, *3-6 (4th Cir. Apr. 23, 1998) [Reply Appendix at 3ra].

In *Barghout*, the Fourth Circuit rejected the ACLU's argument that work done in the district court was "related" to Barghout's subsequent victory on appeal:

> [T]his argument could apply equally well to all work undertaken in the district court, thereby eviscerating the Rule 54(d)(2)(B) time requirement.
>
> [*Id.* at *6].

Work done for one judgment was not to be lumped together with work done for another. See also *Mary M. v. North Lawrence Community School Corp.*, 174 F.R.D. 419, 422 (S.D. Ind. 1997).

The Defendants point out that Rule 54 fees may be sought for work attributable to "any" appealable order. This does not mean that expired liabilities for work attributable to appealable orders stale beyond 14 days can be revived.

Rule 54(d)(2)(B) requires more than a simple fourteen-day-from-any-judgment filing. The Rule also requires that the motion for fees "must specify the judgment . . . entitling the moving party to the award. . . ."

There would be no need to "specify the judgment" if all judgments were interchangeable, so that any recent

---

Circuit remanded jurisdiction for that purpose. *Id.* Judge Smith, in fact, denied the Rule 60 motion. [Pet. at 75a]. Thus, the May 1, 2000 Judgment always remained undisturbed.

judgment had the automatic consequence of reviving all expired fee liabilities from all judgments in the past.

If any new judgment automatically revived expired fee-liability for all past judgments, then the time limit of 54(d)(2)(B) would be truly eviscerated. A party wishing to bring an untimely fee request could always renew expired time by finding some other ground to obtain a judgment by a court in the same case.

This Court does not interpret rules or statutes in such a way as to make their limitations and provisions self-destruct.[3]

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[3] Not causing a rule or a statute to self-destruct is fundamental to the construction of rules and statutes. "It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) (citation omitted). "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). "[In construing statutes] it is our role to make sense rather than nonsense out of the *corpus juris*." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991).

THE *EX POST FACTO* CLAUSES OF THE UNITED STATES CONSTITUTION

The United States Constitution, Article I, Section 9, Clause 3 provides: "No Bill of Attainder or ex post facto Law shall be passed."

Article I, Section 10, Clause 1 provides in part: "No State shall . . . pass any bill of attainder, ex post facto law . . . "

FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(4)(A)

(4) *Effect of a Motion on a Notice of Appeal.* (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

FEDERAL RULE OF CIVIL PROCEDURE 59(e)

(e) ***Motion to Alter or Amend Judgment.*** Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

LEXSEE 1998 U.S. App. LEXIS 7829

GEORGE BARGHOUT, Plaintiff-Appellee, v. BUREAU OF KOSHER MEAT AND FOOD CONTROL; MAYER KUREFELD, Inspector; MAYOR AND CITY COUNCIL OF BALTIMORE, Defendants-Appellants, and JOSEPH NELKIN; JOSEPH ROBISON, Individually and in his official capacity as Mayor of Laurel, Defendants.

No. 96-2366

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

February 27, 1998, Submitted

April 23, 1998, Decided

NOTICE:

*1 RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY:

As Amended.

Reported in Table Case Format at: *1998 U.S. App. LEXIS 13809.*

PRIOR HISTORY:

Appeal from the United States District Court for the District of Maryland, at Baltimore, Benson E. Legg, District Judge. (CA-91-141-L).

DISPOSITION:
REVERSED.

COUNSEL:

Otho M. Thompson, Acting City Solicitor, Burton H. Levin, Principal Counsel, Baltimore, Maryland, for Appellants.

Karen J. Detling, KENNY, VETTORI & ROBINSON, P.A., Baltimore, Maryland; Susan Goering, Deborah Jeon, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, Baltimore, Maryland; Imad K. Dajani, Baltimore, Maryland, for Appellee.

JUDGES:

Before WILKINS, LUTTIG, and MOTZ, Circuit Judges.

OPINION:

OPINION

PER CURIAM:

George Barghout brought this action seeking a declaration that ordinances of the City of Baltimore regulating fraud in the sale of food labeled as kosher violated the Constitution.[1] In a prior appeal, this court affirmed a decision by the district court holding the Baltimore ordinances to be unconstitutional as violative of the Establishment Clause of the First Amendment. See *Barghout v. Bureau of Kosher Meat & Food Control,* 66 F.3d *2 1337

[1] Barghout named the Bureau of Kosher Meat and Food Control, the Mayor and City Council of Baltimore, and Mayer Kurefeld as Defendants. For ease of reference, we refer to these Defendants collectively as "Baltimore."

(4th Cir. 1995). Following the decision of this court, Barghout petitioned the district court for an award of attorneys' fees and costs incurred in this court on appeal and in the district court prior to the initial appeal. The district court granted Barghout's petitions. Baltimore now appeals the portion of the award that allowed attorneys' fees incurred in the district court prior to the initial appeal, arguing that Barghout's request was untimely. We agree.

I.

Counsel for Barghout submitted two petitions for attorneys' fees and costs. The first such petition sought a total of $6,000 in attorneys' fees and expenses incurred by Imad Dajani, Barghout's trial counsel; all of this amount was attributable to work performed in the district court prior to the appeal to this court. An additional *3 petition was filed seeking to recover a total of $9,713.91 in attorneys' fees and expenses for attorneys employed by the American Civil Liberties Union (ACLU),[2] of which only $648 was attributable to work performed in the district court prior to the initial appeal.

Baltimore did not challenge the petitions except to the extent that Barghout requested attorneys' fees for the time his attorneys spent in the district court prior to the appeal to this court. As to this $6,648, Baltimore argued that the petitions requesting attorneys' fees were untimely under Federal Rule of Civil Procedure 54(d)(2)(B) because they

[2] For ease of reference, we refer to the attorneys employed by the ACLU collectively as "the ACLU."

were not filed within 14 days after entry of the judgment of the district court. Dajani responded that the time for filing a request for attorneys' fees was tolled by the filing of a post-trial motion to alter or amend the judgment and the filing of a notice of appeal. The ACLU contended that it could *4 not have filed within 14 days of the district court judgment because it did not become counsel of record until after that date. The ACLU also asserted that although the work it performed in the district court was in response to the post-trial motion, the work should be considered appellate work, for which the petitions were timely, because the work was done in preparation for the appeal.

Without addressing the timeliness question, the district court awarded the full amount of the attorneys' fees and costs requested. Baltimore now appeals to the extent that the district court awarded $6,648 in attorneys' fees attributable to the time spent for work performed in district court prior to the initial appeal.

II.

Federal Rule of Civil Procedure 54(d)(2)(B), governing the time for filing requests for attorneys' fees, provides in pertinent part:

> Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment.

A judgment includes "any order from which an appeal lies." Fed. R. Civ. P. 54(a). The Advisory Committee's notes to Rule 54 indicate that one of the reasons for the imposition of a time limitation *5 "is to assure that the opposing

party is informed of the claim before the time for appeal has clapsed." Fed. R. Civ. P. 54 advisory committee's notes.

The district court ruled in favor of Barghout on the merits of his action and entered judgment on October 10, 1993. Thereafter, a timely post-trial motion and responses were filed. See Fed. R. Civ. P. 59. In April 1994, Dajani moved for and was granted leave to withdraw as counsel, and the ACLU – which had previously participated as amicus curiae – entered an appearance on behalf of Barghout on April 26, 1994. Although the district court ruled on the post-trial motion on June 10, 1994, Barghout did not file a request for attorneys' fees and costs until after the 1995 decision of this court. Obviously, Barghout's request for attorneys' fees was not timely insofar as it sought reimbursement for time attributable to proceedings in the district court prior to the initial appeal.

Dajani's claim that the post-trial motion and notice of appeal stayed the time for filing the request for attorneys' fees is contrary to the language of the rule and the Advisory Committee's notes. See Fed. R. Civ. P. 54 advisory committee's notes. The ACLU *6 errs in contending that because it did not enter an appearance as counsel until after the district court issued its October 10, 1993 judgment, it could not have complied with the rule. Nothing prevented the ACLU from moving the court within 14 days of the denial of the post-trial motion, which undoubtedly was a ruling from which appeal could be taken. See id. Finally, we reject the argument of the ACLU that the attorneys' fees incurred were related to the appeal; this argument could apply equally to all work undertaken in the district court, thereby eviscerating the Rule 54(d)(2)(B) time requirement.

The question remains, however, whether the order of the district court awarding the attorneys' fees can be viewed as a tacit grant of an extension of time to file the petitions since Rule 54(d)(2)(B) provides that requests for attorneys' fees must be filed within 14 days "unless otherwise provided by statute or order of the court." We conclude that the order cannot be so construed. Federal Rule of Civil Procedure 6(b) provides:

> When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion *7 (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed . . . or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

This rule did not authorize the district court to extend the time to petition for attorneys' fees in the award order. No enlargement of time or request therefor was made during the 14-day period following judgment. And, neither Dajani nor the ACLU has taken the position that the failure to timely file the attorneys' fee requests was attributable to excusable neglect.

III.

Consequently, we reverse the award of attorneys' fees to the extent that it includes the $6,648 attributable to work performed in the district court prior to the initial appeal.

REVERSED.